Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?

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The copyright reform package tabled by the European Commission[1] and the decision of the Court of Justice in GS Media[2] caused an earthquake in the field of copyright. The reform plans will hardly lead to a 'modern' copyright framework, as announced by the Commission in its earlier communication.[3] In GS Media, the Court seems to downgrade copyright to a mere unfair competition claim in an attempt to regulate hyperlinks to illegal online content on the basis of harmonized EU copyright law. From the perspective of innovation policy, both developments appear problematic.

Introduction

In the digital environment, new business models and new content platforms are constantly emerging: business models that show new ways of bringing content to Internet users, business models that create added value by providing overviews of content that is available online, business models that no longer rely on traditional strategies of controlling individual acts of use on the basis of copyright.

In many cases, it is not the traditional content industry taking the first step. Instead, innovators are needed who lead the way by using disruptive internet technology in new ways and showing how profit can be derived from content without relying on the traditional model of selling individual copies of a work. Often, start-up companies or outsiders not belonging to the traditional creative industries lead the way to new ways of making money – players that are not trapped in analogue thinking and routines. Resulting new, disruptive business models serve as sources of inspiration for incumbent entrepreneurs in the sector. Ultimately, they help the creative industries as a whole to adapt to the digital environment and survive the digital revolution. Not surprisingly, more and more traditional creative industries embark on the development of new business models as well.[4]

Impact of Copyright

Against this background, the question arises which copyright norms we need at this point in time. Obviously, a copyright reform is a failure if it impedes the evolution of new online platforms and the transition of traditional creative industries to fresh business models instead of encouraging the switch to content platform creation, community building and product customization. Viewed from this perspective, the current reform proposals of the EU Commission[5] are problematic. An ancillary right relating to 'digital uses' of press publications,[6] for example, is likely to give the false impression that press publishers could survive by simply transposing analogue business models into the digital environment and commercializing content the same way they always did. It will give hope that a new revenue

1 The Commission's recently published reform package consists of several elements. See European Commission, 14 September 2016, *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, Doc. COM(2016) 593 final; *Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes*, Doc. COM(2016) 594 final; *Proposal for a Regulation of the European Parliament and of the Council on the Cross-Border Exchange Between the Union and Third Countries of Accessible Format Copies of Certain Works and Other Subject-Matter Protected by Copyright and Related Rights for the Benefit of Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, Doc. COM(2016) 595 final; *Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Works and Other Subject-Matter Protected by Copyright and Related Rights for the Benefit of Persons who are Blind, Visually Impaired or Otherwise Print Disabled*, Doc. COM(2016) 596 final. The following discussion will focus on the first element, the Proposal for a Copyright Digital Single Market Directive.

2 CJEU, 8 September 2016, case C-160/15, GS Media, published elsewhere in this issue with case comment K. Koelman.

3 As to the earlier promise of the establishment of a modern framework, see European Commission, 9 December 2015, *Towards a Modern, More European Copyright Framework*, Doc. COM(2015) 626 final.

4 M.R.F. Senftleben, M. Kerk, M. Buiten and K. Heine, *From Books to Content Platforms – New Business Models in the Dutch Publishing Sector*, Study commissioned by Nederlands Uitgeversverbond, Amsterdam: Vrije Universiteit Amsterdam 2016 (forthcoming).

5 European Commission, 14 September 2016, *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, Doc. COM(2016) 593 final.

6 European Commission, supra note 5, Article 11.

stream will result from strengthened rights to control innovative digital uses made by others, in particular search engines enhancing the online visibility of press publications. Experiments with an ancillary right for press publishers have already failed in Germany and Spain.[7] Instead of generating extra revenue, online traffic to websites of publishers was reduced. The smaller the publisher, the more corrosive the effect of the legislative measure.[8]

Thus, an ancillary right for press publishers seems a bad idea.[9] Instead of experimenting with an additional layer of protection, the EU legislator should encourage press publishers to create online platforms with premium monitoring, search and customization options themselves. Instead of leaving the development of innovative online services to others and becoming dependent on royalties paid by innovators outside the publishing sector, innovation should take place within the sector.

Hence, less may actually be more. The more the creative industries are exposed to disruptive new online business models, the more they will feel the need to change traditional ways of commercializing literary and artistic works. This does not imply the abolition of copyright law. 'Less protection' and 'more incentives for innovation' can be achieved by creating robust areas of freedom in and around copyright law: breathing space that allows new entrants to experiment with new business models and lead the way to a truly competitive creative industry that is no longer struggling with the digital environment but constantly developing new and innovative content platforms itself.[10]

Reform Wish List

More concretely, a copyright reform aiming at robust areas of freedom to stimulate innovation in the creative industries should provide for limitations of copyright protection that are flexible enough to keep pace with the rapid development of digital technology,[11] safe harbours shielding newcomers from direct liability for unintended infringement,[12] a broad doctrine of implied consent,[13] more space for compulsory licensing[14] and a departure from the prohibition of formalities where this is possible without violating international law.[15]

As it currently stands, the EU copyright reform will fail to achieve any of these goals. The Commission Proposal only contains several specific exceptions to copyright protection that would supplement the closed list in Article 5 of the Information Society Directive 2001/29/EC.[16] Given the lengthy legislative process in the EU,[17] these specific exceptions are not unlikely to be outdated even before they are finally implemented at the national level. A flexible, open-ended limitation that allows courts to constantly adapt the scope of copyright protection to new developments is sought in vain. Moreover, the safe harbour for hosting is weakened by an opaque provision reflecting the need to enter into agreements with copyright holders and implementing 'content recognition technologies'.[18] This provision seems to have been inspired by the activities of well-established Internet companies having content ID systems already in place. Small and medium-sized companies, however, may have substantial difficulty to surmount this additional hurdle. Further market concentration seems unavoidable.

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7 K.-N. Peifer, 'Leistungsschutzrecht für Presseverleger – „Zombie im Paragrafen-Dschungel" oder Retter in der Not?', *GRUR Prax* 2013, p. 149-153; R. Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government – Its Compliance With International and EU Law*, IN3 Working Paper Series, Barcelona: Universitat Oberta de Catalunya 2014, p. 1-40.

8 NERA Economic Consulting, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual*, Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP), Madrid: NERA 2015, available at www.aeepp.com/noticia/2272/actividades/informe-economico-del-impacto-del-nuevo-articulo-32.2-de-la-lpi-nera-para-la-aeepp.html; Bitkom, *Ancillary Copyright for Publishers – Taking Stock in Germany*, Berlin: Bitkom 2015, available at www.bitkom.org/Bitkom/Publikationen/Ancillary-Copyright-for-Publishers-Taking-Stock-in-Germany.html.

9 See also the critical comments by D.J.G. Visser, 'Viermaal auteursrecht in de digitale eengemaakte markt', *NtEr* 2016 (forthcoming).

10 C. Geiger, 'Promoting Creativity Through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law', *Vanderbilt Journal of Entertainment and Technology Law* 12 (2010), p. 515; M.R.F. Senftleben, 'Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions', *JIPITEC* 4 (2013), p. 87-103.

11 P.B. Hugenholtz/M.R.F. Senftleben, *Fair Use in Europe. In Search of Flexibilities*, Amsterdam: Institute for Information Law/VU Centre for Law and Governance 2011, p. 1-30; P.B. Hugenholtz, 'Flexible Copyright. Can EU Author's Right Accommodate Fair Use?', in: R. Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions*, Cambridge: Cambridge University Press 2016, p. 242-258; M.R.F. Senftleben, 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law', in: G.B. Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property*, Cheltenham: Edward Elgar 2013, p. 30-67. See also Article 5.5 of the European Copyright Code that resulted from the Wittem Project, available at www.copyrightcode.eu

12 M. Peguera, 'The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems', *Columbia Journal of Law and the Arts* 32 (2009), p. 481-512; H. Travis, 'Opting Out of the Internet in the United States and the European Union: Copyright, Safe Harbors, and International Law', *Notre Dame Law Review* 84 (2008), p. 331-407; M.R.F. Senftleben, 'Breathing Space for Cloud-Based Business Models: Exploring the Matrix of Copyright Limitations, Safe Harbours and Injunctions', *Journal of Intellectual Property, Information Technology and E-Commerce Law* 4 (2013), p. 87-103.

13 M. Leistner, 'The German Federal Supreme Court's Judgment on Google's Image Search – A Topical Example of the "Limitations" of the European Approach to Exceptions and Limitations', *IIC* 42 (2011), p. 417; G. Spindler, 'Bildersuchmaschinen, Schranken und konkludente Einwilligung im Urheberrecht – Besprechung der Entscheidung "Vorschaubilder"', *GRUR* 2010, p. 785; L.C.M.R. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation', *JIPITEC* 1 (2010), p. 55; A. Ohly, 'Zwölf Thesen zur Einwilligung im Internet', *GRUR* 2012, p. 983; M.R.F. Senftleben, 'Internet Search Results – A Permissible Quotation?', *RIDA* 235 (2013), p. 3-111.

14 R.M. Hilty and M.R.F. Senftleben, 'Rückschnitt durch Differenzierung? – Wege zur Reduktion dysfunktionaler Effekte des Urheberrechts auf Kreativ- und Angebotsmärkte', in: T. Dreier and R.M. Hilty (eds.), *Vom Magnettonband zu Social Media – Festschrift 50 Jahre Urheberrechtsgesetz (UrhG)*, Munich: C.H. Beck 2015, p. 317-338; M.R.F. Senftleben, 'Monolithic Copyright, Market Power and Market Definition – The Impact of Competition Law on the Licensing of Copyrighted Content', in: R.M. Hilty and K.-C. Liu (eds.), *Exploring Sensible Ways of Paying Copyright Owners*, Berlin Heidelberg: Springer 2016 (forthcoming).

15 S. van Gompel, *Formalities in Copyright Law – An Analysis of their History, Rationales and Possible Future*, The Hague/London/New York: Kluwer Law International 2011; M.R.F. Senftleben, 'How to Overcome the Normal Exploitation Obstacle: Opt-Out Formalities, Embargo Periods, and the International Three-Step Test', *Berkeley Technology Law Journal Commentaries* 1 (2014), p. 1-19.

16 European Commission, supra note 5, Articles 3-5.

17 M.M.M. van Eechoud et al., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*, The Hague/London/New York: Kluwer Law International 2009, p. 298.

18 European Commission, supra note 5, Article 13.

GS Media

But even without these short-sighted, conservative reform proposals, the innovation climate in the EU has reached a new low-point with the decision of the Court of Justice in the *GS Media* case.[19] In *GS Media*, the Court developed complex rules with regard to hyperlinks referring to illegal content made available on the Internet without the copyright holder's consent – the famous Playboy photographs of Britt Dekker which had been made available – prior to official publication – on the Australian data storage site Filefactory.com without consent. Reporting about the leaked photos and providing a hyperlink, GeenStijl generated additional traffic to the illegal content. Discussing this use of hyperlinks, the Court introduced a subjective knowledge test in the infringement analysis to be carried out in the case of commercial use of hyperlinks:

> *'Furthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29.'*[20]

With this holding, the Court rejected strict liability in respect of hyperlinks to illegal content. A finding of infringement does not follow automatically from the very act of hyperlinking. Instead, the exclusive right can only be invoked if the hyperlinker had the requisite knowledge. As a result, the copyright action resembles an action based on general unfair competition law: the alleged infringer can only be held responsible for the infringing act if he had sufficient knowledge of the illegal nature of the online source. The *GS Media* decision sets forth a standard that recalls the assessment of negligence and duty of care in the context of unfair competition claims.[21] Hence, copyright seems to have been downgraded to a mere unfair competition claim in hyperlinking cases concerning illegal content. This is not a clear victory of copyright holders. It appears as a Pyrrhic victory that may pave the way for a more general erosion of copyright as a subjective intellectual property right offering a stronger legal position than a mere unfair competition claim. If the decision is not necessarily good news for copyright holders, does it at least make sense from the perspective of competition and innovation policies?

Innovation Climate

Again, an affirmative answer is hardly possible: adding a presumption of knowledge of illegal content to the infringement test governing the commercial use of hyperlinks, the Court eroded the legal certainty necessary for the evolution of new business models and online platforms. Establishing an obligation of 'necessary checks' and a presumption of knowledge in cases of commercial hyperlinking activities, the Court further specified the hyperlinker's duty of care. A commercial user of hyperlinks is expected to conduct the checks necessary to identify content posted without the consent of the copyright holder. Accordingly, knowledge of the infringing nature of online sources can be presumed if a hyperlink is found to relate to illegal content. In contrast to the safe harbour provisions of the E-Commerce Directive 2000/31/EC concerning secondary liability for infringing content,[22] the burden of monitoring the Internet is thus not to be borne by copyright holders. Instead, the obligation of monitoring content is imposed on the commercial provider of hyperlinks.

However, the presumption of knowledge can be rebutted. This nuance in the Court's liability concept will ultimately determine the extent of the monitoring obligation. As the *GS Media* decision does not provide guidance on ways to successfully rebut the knowledge presumption, it is an open question which factors are capable of tipping the scales in favour of the hyperlinker.

With regard to the safe harbour for hosting laid down in Article 14 of the E-Commerce Directive, this may lead to a line of reasoning which, ultimately, again reverses the burden of monitoring the Internet – this time in favour of the hyperlinker. In the light of the harmonized safe harbour provisions, it seems plausible that the presumption of knowledge can be rebutted in cases where the hyperlinker falls under the safe harbour for hosting. In this case, EU legislation itself sets forth a specific regime for determining knowledge of infringing content.[23] As long as the host does not play an active role in respect of content uploaded by third parties, knowledge can only be assumed after notification of infringing content which, in turn, triggers a takedown obligation. As the safe harbour for hosting is

19 CJEU, 8 September 2016, case C-160/15, GS Media.

20 CJEU, 8 September 2016, case C-160/15, GS Media, para. 51.

21 J.G. Reus, 'De bescherming van IE-rechten op platforms voor user-generated content – in hoeverre is een maatregel tot preventief filteren mogelijk?', *IER* 2012, p. 413; C. Alberdingk Thijm, 'Wat is de zorgplicht van Hyves, XS4All en Marktplaats?', *Ars Aequi* 2008, p. 573. For a broad discussion of a sophisticated differentiation of warning, monitoring, control and prevention obligations on the basis of active or neutral involvement, see M. Leistner, 'Von "Grundig-Reporter(n) zu Paperboy(s)" Entwicklungsperspektiven der Verantwortlichkeit im Urheberrecht', *GRUR* 2006, p. 801.

22 As to the scope of the safe harbour for hosting laid down in Article 14 of the Directive, see CJEU, 23 March 2010, cases C-236/08-238/08, Google France and Google/Louis Vuitton et al., para. 114-118; CJEU, 12 July 2011, case C-324/09, L'Oréal/eBay, para. 120-122. For a discussion of the EU safe harbour system, see the literature references supra note 12.

23 National approaches to this knowledge management requirement differ from country to country and between the courts. See the overview provided by R. Matulionyte/S. Nerisson, 'The French Route to an ISP Safe Harbour, Compared to German and US Ways', *IIC* 42 (2011), p. 55.

combined with an exclusion of a general burden of monitoring content following from Article 15 of the E-Commerce Directive, this opportunity to rebut the *GS Media* knowledge presumption will have to be understood to reintroduce the hyperlinker's immunity against a general monitoring obligation.[24]

The presumption of knowledge of illegal content will also be rebuttable in cases where the hyperlinker can rely on a copyright exception, such as the right of quotation, the freedom of parody or the press privilege of reproducing articles and other works concerning current economic, political or religious topics.[25] The presumption may also be rebuttable in cases where implied consent of the copyright holder can be assumed.[26]

Potentially, it may even be rebuttable in cases where a copyright holder does not contribute to the identification of illegal content by providing content ID information in the standard format of 'content recognition technologies' mentioned in the copyright reform proposals. This latter point is doubtful because of the prohibition of formalities in Article 5(2) of the Berne Convention. Can an obligation to use certain technical standards *de facto* be imposed on the copyright holder through the backdoor of the knowledge test in hyperlinking cases? Would the rebuttal of the knowledge assumption because of reluctance to comply with technical standards qualify as a forbidden copyright formality in the sense of Article 5(2) – a forbidden formal obstacle to '[t]he enjoyment and the exercise of these rights'?[27]

Hence, the *GS Media* decision raises more questions than it solves.[28] It remains to be seen which scope of protection EU copyright law offers in cases of hyperlinking to illegal content when the infringement analysis is based on the knowledge test introduced by the Court. Until the contours of the new knowledge requirement become clearer in subsequent decisions, the uncertainty surrounding the use of hyperlinks places a heavy burden on innovators who will hardly be capable of creating new online platforms and services without hyperlinking technology.

As hyperlinking is a universal Internet technology, the corrosive effect of the decision ranges from search engines to social media. It also impacts new business models of traditional creative industry branches which involve the use of hyperlinks to social media contributions and user-generated content. Again, small and medium-sized players will be hit harder than Internet majors. They will find it more difficult to carry out 'the necessary checks'[29] to ensure that no hyperlink to illegal content is used. In many cases, they will be unable to participate in lengthy and costly lawsuits about the applicable knowledge standard. And they will find it more difficult to convince financiers to invest in a new online platform which, given the current Internet architecture, inevitably requires the use of hyperlinks.

Conclusion

In sum, neither the copyright reform nor the *GS Media* decision is conducive to the innovation climate in the EU. Instead of less market entrance barriers and more room for new business models, the copyright reform and the *GS Media* decision are likely to lead to further market concentration and less room for new business models. Given the fact that the conceptual contours of a 'modern',[30] innovation-friendly copyright regime for the digital era have already been drawn quite clearly in various research projects and related literature,[31] it is difficult to understand why EU policy makers and courts still have so much difficulty to develop an appropriate legal framework.

24 For a proposal to render the safe harbour for hosting generally inapplicable with regard to copyrighted material, see High Council for Literary and Artistic Property of the French Ministry of Culture and Communication, 3 November 2015, *Mission to Link Directives 2000/31 and 2001/29 – Report and Proposals*, p. 11, based on a study prepared by P. Sirinelli, J.-A. Benazeraf and A. Bensamoun who had been asked to propose changes to current EU legislation 'enabling the effective enforcement of copyright and related rights in the digital environment, particularly on platforms which disseminate protected content'. The adoption of this proposal would lead to a situation where the safe harbour for hosting can no longer be invoked to rebut the knowledge presumption.

25 CJEU, 1 December 2011, case C-145/10, Eva Maria Painer/Der Standard, para. 134; CJEU, 3 September 2014, case C-201/13, Deckmyn, para. 22-27. For a discussion of the scope of these use privileges in the digital environment, see M.R.F. Senftleben, 'Quotations, Parody and Fair Use', in: P.B. Hugenholtz/A.A. Quaedvlieg/D.J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912-2012*, Amstelveen: deLex 2012, p. 359-412; M. de Zwaan, 'Ruimte in het citaatrecht in Europa? Zoekmachine vindt niets bij "search naar flexibilities"', *AMI* 2012, p. 141; A.A. Quaedvlieg, 'De parodiërende nabootsing als een bijzondere vorm van geoorloofd citaat', *RM Themis* 1987, p. 279.

26 For a broad implied consent doctrine in the digital environment, see the literature on developments in Germany, supra note 13.

27 See literature references supra note 15.

28 For an illustration of the various practical and legal questions arising from the decision, see the case comment by A.R. Lodder, *CR* 2016 (forthcoming).

29 CJEU, 8 September 2016, case C-160/15, GS Media, para. 51.

30 European Commission, supra note 3.

31 For instance, the Wittem project was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The proposed European Copyright Code of the Wittem Project is available at www.copyrightcode.eu. Guidelines with regard to enhanced flexibility in the area of copyright limitations have been developed in a joint project of the Max Planck Institute for Innovation and Competition, Munich, and Queen Mary, London. See C. Geiger/J. Griffiths/R.M. Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law', *IIC* 39 (2008), p. 707. For a recommendation to keep the question of hyperlinking outside the copyright system, see L. Bently et al., 'The Reference to the CJEU in Case C-466/12 Svensson', *University of Cambridge Legal Studies Research Paper* No. 6/2013, p. 13-14.